

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, et al.,)	
)	
Petitioners,)	
v.)	Docket No. 03-1380
)	(and consolidated cases 03-1381,
UNITED STATES ENVIRONMENTAL)	03-1383, 03-1390 and 03-1402)
PROTECTION AGENCY,)	
)	
Respondent.)	
)	

ENVIRONMENTAL PETITIONERS' MOTION FOR A STAY PENDING REVIEW

The above-captioned cases challenge a rule issued by respondent ("EPA") that exempts a broad category of pollution-increasing activities from the Clean Air Act's new source review ("NSR") pre-construction permitting requirements. Because this exemption violates the plain language of the Act and will injure their members irreparably, Petitioners Natural Resources Defense Council, Environmental Defense, Sierra Club, Communities for a Better Environment, American Lung Association, United States Public Interest Research Group, Clean Air Council, Michigan Environmental Council, Group Against Smog and Pollution, and Scenic Hudson ("Environmental Petitioners") hereby move for a stay of the rule pending the Court's review. A copy of the rule is attached to this motion. (Ex. A, hereto). Environmental Petitioners requested a stay of the rule from EPA, but EPA denied their request. *See* Letter of Jeffrey R. Holmstead to Matthew I. Levine and David G. McIntosh dated Nov. 13, 2003 (Ex. B, hereto).

BACKGROUND

The Clean Air Act ("CAA") requires a major stationary source of air pollution to undergo new source review ("NSR") prior to making any "modification."¹ The term "modification" is defined in the Act to include, *inter alia*, "any physical change . . . which increases the amount of any air pollutant emitted by such source." CAA § 111(a)(4), 42 U.S.C. § 7411(a)(4).

Before proceeding with an activity that is subject to NSR, a source must apply for and obtain a preconstruction permit, 42 U.S.C. §§ 7475(a)(1), 7502(c)(5)(2), and agree to install and operate up-to-date pollution control equipment, 42 U.S.C. §§ 7475, 7503. In addition, a source located in an area that is in violation of the national ambient air quality standards ("NAAQS") must offset any emission increase with emission decreases (from the same source or other sources) sufficient to ensure that overall stationary source emissions in the area will decrease. 42 U.S.C. § 7503(a)(1)(A). Similarly, a source located in an area with relatively unpolluted air must ensure that increased emissions will not result in a significant deterioration of air quality or cause a violation of the NAAQS. 42 U.S.C. § 7475(a)(3). An NSR permit cannot be issued until after affected members of the public are notified and given an opportunity to comment. 42 U.S.C. § 7475(a)(2), 40 C.F.R. §§ 51.160 and 51.161 (providing for a 30-day public comment period).

Though the Act offers no exclusions from the definition of "modification," EPA has historically provided an exception for "routine maintenance, repair and replacement." Prior to its recent rulemaking, EPA only applied the exemption "to the day-to-day maintenance and repair of

¹ The term "NSR" actually refers to two CAA programs, the "Prevention of Significant Deterioration" ("PSD") program and the "Non-Attainment NSR" program. PSD applies in areas that are in compliance with national ambient air quality standards, 42 U.S.C. § 7470, et seq., while non-attainment NSR applies where these standards are not met. 42 U.S.C. § 7502-03. PSD applies to "construction" activities, 42 U.S.C. § 7475(a), and "construction" is defined to include "modification." 42 U.S.C. § 7469(2)(C). Likewise, NA NSR applies to "new or modified sources." 42 U.S.C. § 7502(c)(5).

equipment and the replacement of relatively small parts of a plant that frequently require replacement.” 68 Fed. Reg. 61248, 61270/3 (Oct. 27, 2003).

In the rulemaking under review, EPA dramatically broadened the exemption to encompass multi-million dollar, once-in-a-lifetime equipment replacement activities. *See* 68 Fed. Reg. at 61253/2 (stating that “[t]oday’s rule does not distinguish between the replacement of components that are expected to be replaced frequently or periodically and the replacement of components that may occur on a less frequent or one-time basis. It likewise does not distinguish between the replacement of larger and smaller components.”); *see also* Declaration of David Schoengold (Ex. C, hereto) (describing the scope of activities that will be exempt under the new rule). Indeed, EPA explicitly sought to exclude all but the most unusual equipment replacement activities. 68 Fed. Reg. at 61257/3 (stating that “individual replacement activities would, in fact, qualify for [the exemption] and that limited groupings of these activities would qualify. However, larger groupings of these activities—groupings that are not usually seen in the industry—would not qualify.”) (emphasis added).

Specifically, the rule categorically exempts an equipment replacement activity from NSR so long as (1) the new equipment is “identical or functionally equivalent” to the old equipment, (2) the cost of replacing the equipment is no more than twenty percent of the cost of replacing the entire process unit² to which the activity pertains, (3) the replacement does not alter a “design parameter” of the process unit, and (4) the replacement will not cause a violation of an existing

² The rule defines “process unit” very broadly. For example, the process unit for a power plant includes essentially all equipment necessary to generate electricity: “coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler, burners, turbine generator set, condensor, cooling tower, water treatment system, air preheaters, and operating control systems.” 40 C.F.R. § 51.165(a)(1)(x)(iii)(D)(1) (68 Fed. Reg. 61277/1), 40 C.F.R. § 52.21(b)(55)(ii)(a) (68 Fed. Reg. 61279/3). By defining “process unit” so broadly, the rule enables sources to undertake major renovations without triggering NSR. For example, a power plant could replace an entire utility boiler without applying for a NSR permit.

legally-enforceable emission limit. 40 C.F.R. §§ 51.165(h) (68 Fed. Reg. at 61277-78), 52.21(cc) (68 Fed. Reg. at 61280). So long as these criteria are met, the activity is exempt regardless of the resulting emissions increase.

The categorical exemption is so broad that it would encompass almost all of the equipment replacement activities that are the subject of NSR enforcement actions brought by EPA over the past several years against coal-fired power plants, refineries, and other large air polluters. See Schoengold Decl., ¶¶ 4, 21, *see also* 68 Fed. Reg. at 61258/2 (responding to public comments, EPA asserts merely that “to the extent that [activities subject to current enforcement actions] qualify for the [exemption], we now believe that such activities, if conducted in the future, should be excluded from major NSR.”).

For example, the rule would have exempted the \$23 million equipment replacement project undertaken by the Tennessee Valley Authority (“TVA”) at Unit 1 of its Cumberland Plant, a coal-fired power plant. Attachment K to Schoengold Decl. (project cost 2.4% of the cost of replacing Cumberland Unit 1). That project, which required a three-month shutdown of the unit, resulted in an emissions increase of 21,187 tons of nitrogen oxides (“NO_x”) per year.³ Final Order on Reconsideration in *In re Tennessee Valley Authority*, (EPA Environmental Appeals Board, September 15, 2000) (Ex. D, hereto) (excerpt), at 62, 117. The rule also would have exempted the \$5 million equipment replacement project undertaken by the Ohio Edison Company at Unit 6 of its W.H. Sammis Station, another coal-fired power plant. Attachment B to Schoengold Decl. (project cost 1.5% of the replacement cost of Sammis Unit 6). That project, which required a five-month shut-down, resulted in a sulfur dioxide (“SO₂”) emissions increase

³ 21,187 tons per year of NO_x is nearly one-and-a-half times the total amount of NO_x emitted annually by all sources located in the District of Columbia. “State Emissions Totals (NEI 1999 v3),” published at www.emissionsonline.org/nei99v3/state/stindex.htm.

of 10,676 tons per year and a NOx emissions increase of 2,518 tons per year. *United States v. Ohio Edison Co.*, 276 F.Supp. 2d 829, 845, 882 (S.D. Ohio 2003). Indeed, these renovations would have fallen well within the scope of the exemption; the new rule would exempt substantially larger projects. *See supra* at 2, n.2.

Finally, EPA managed to identify only a few real-world examples of equipment replacements that would not have qualified for the exemption.

ARGUMENT

In deciding whether to grant a stay, this Court considers four factors: (1) whether the moving party is “likely to prevail on the merits;” (2) whether without a stay the moving party is likely to be “irreparably injured;” (3) whether the issuance of a stay would “substantially harm other parties interested in the proceedings;” and (4), whether a stay is in the public interest. *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). *See* D.C. Circuit Handbook at 32-33. To obtain a stay, the movant must show that the balance of relevant factors weighs in its favor. *Id.* at 843. As shown below, Environmental Petitioners fully meet the requirements for a stay.

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS

A stay of EPA’s equipment replacement rule is warranted because there is a substantial likelihood that petitioners will prevail on the merits of their challenge. As explained below, the broad exemption carved out of the Act’s definition of “modification” violates the unambiguous terms of the statute and conflicts with the Act’s structure and purpose.

A. EPA’s Equipment Replacement Rule Violates the Unambiguous Statutory Definition of “Modification”

If an existing major source makes a physical or operational change that does not result in an emission increase, that change is exempt from NSR under the express terms of CAA §

111(a)(4). 42 U.S.C. § 7411(a)(4)(defining a “modification” subject to NSR as “any physical change . . . which increases the amount of any air pollutant emitted by such source.”). At issue in this case is whether EPA can carve out an NSR exemption for a broad category of equipment replacement activities that do result in significant emissions increases based on a meritless assertion that those activities do not constitute “any physical change.”

The replacement of deteriorated physical components with new “functionally equivalent” components clearly falls within the plain meaning of the term “any physical change.” First, it is undisputed that the plain meaning of the term “physical change” encompasses the replacement of an item with a “functionally equivalent” item. As EPA explained in the preamble to the final rule, “‘change’ could encompass a range of activities from periodically replacing filters in production machinery, to once-in-a-lifetime anticipated replacement of a component, to complete replacement of a production unit.” 68 Fed. Reg. at 61271/3. Indeed, people commonly use the term “change” to refer to the replacement of one item with another functionally equivalent item, e.g., changing the oil in a car, *see id.*, or changing one’s shirt. In the same way, a plain reading of the word “change” as used by Congress in CAA § 111(a)(4) encompasses the type of equipment replacement activities that are exempted from NSR by EPA’s new rule.

Second, the statute refers not just to a “physical change,” but to “any physical change.” Thus, Congress expressed an unambiguous intent to require NSR for any activity that constitutes a “physical change” under any interpretation of that term, if that change will result in an emissions increase. *See Dept. of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002)(quoting *U.S. v. Gonzales*, 520 U.S. 1, 5 (1977)(“the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind’”); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589(1980)(construing the phrase “any other final action” in CAA § 307 to

mean “exactly what it says, namely, *any* other final action.”)(emphasis in original). Given that the plain meaning of “physical change” undisputedly encompasses the replacement of deteriorating equipment with functionally equivalent equipment, such an activity plainly constitutes “any physical change” under the CAA § 111(a)(4) definition of “modification.”

EPA’s rule purports to exempt certain physical changes from NSR based on, *inter alia*, their cost and whether they alter the source’s original design. Such an exemption is not authorized by statute and cannot be created administratively by EPA. *See Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997)(“this court has consistently struck down administrative narrowing of clear statutory mandates.”). With respect to EPA’s cost threshold, this Court has already held that “the term ‘modification’ is nowhere limited to physical changes exceeding a certain magnitude.” *Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1980). Similarly, EPA’s cost and design change arguments have already been rejected by the Seventh Circuit, which held in *Wisconsin Elec. Power Co. v. Reilly* (“WEPCO”) that “whether the replacement of air heaters and steam drums is a ‘*basic or fundamental* change’ in [defendant’s facility] is irrelevant for our purposes, given Congress’s directions on the subject: ‘The term ‘modification’ means *any* physical change’” 893 F.2d 901, 908 (7th Cir. 1990) (emphasis in original); *id.* at 913 (“the modification provision applies to any physical change, without regard to cost, that causes an increase in emissions.”). Contrary to EPA’s current position, the Seventh Circuit concluded that under the statute’s broad modification provisions even “the most trivial activities—the replacement of leaky pipes, for example—may trigger the modification provisions if the change results in an increase in the emissions of a facility.” *Id.* at 905.

Not only does EPA’s rule violate the plain language of CAA § 111(a)(4), but it also contravenes other statutory provisions designed to implement the Act’s purposes of (1) bringing

areas with poor air quality into attainment of the NAAQS, (2) ensuring that air quality in places where the air is relatively clean does not deteriorate significantly, and (3) enabling affected members of the public to participate in any decision to allow a major source to increase emissions. Under EPA's exemption, sources will be able to dramatically increase their emissions without ensuring that increased emissions will not harm public health and the environment. Indeed, sources will not be required even to notify environmental regulators or the public of such changes.

Until its recent rulemaking, EPA has itself insisted that the CAA § 111(a)(4) definition of "modification" applies broadly. For example, in a recent brief filed in the Eleventh Circuit, EPA argued that "Congress established an exceedingly broad definition of the term 'modification' that triggers the requirements of the . . . NSR programs." EPA TVA Br. at 59 (Ex. E, hereto)(excerpts). EPA also confirmed that "[t]he term 'modification' has long been very broadly interpreted by EPA; the term 'any physical change' suggests sweeping coverage of that term." *Id.* at 163. EPA went on to explain that it was "not surprising" that the defendant "had not seriously contested whether its activities constituted 'physical changes' because "[t]he definition of physical or operational change is so broad . . . that EPA has declared that, standing alone, it would encompass the repair or replacement of a single leaky pipe." *Id.* at 60.

B. EPA's Arguments in Support of Its Rule Are Meritless

Departing from its past position, EPA now asserts that ambiguity in the term "any physical change" gives EPA discretion to interpret the term as it does in its new rule. To the contrary, as demonstrated above, the meaning of this term is clear on its face. When the meaning of a statutory provision is clear—as it is here—there is no need to resort to legislative history. *See Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994)("[W]e do not resort to legislative

history to cloud a statutory text that is clear.”). In any event, nothing in the CAA’s legislative history suggests this statutory language should be interpreted in any way other than in accordance with its plain meaning.

EPA also seeks refuge in an argument that Congress ratified its flexible approach to interpreting the term “any physical change” when it created the NSR program in 1977. *See* 68 Fed. Reg. 61273/3. Specifically, EPA points out that the CAA § 111(a)(4) definition of “modification” also applies to the Act’s New Source Performance Standard (“NSPS”) provisions, and that NSPS regulations in effect when Congress adopted the NSR program already provided a number of exceptions from the definition of “modification.” Thus, EPA argues that Congress must have ratified its ability to carve out exceptions from the definition of “modification” for NSR purposes. This argument must be rejected.

First, EPA does not and cannot point to anything in legislative history indicating that Congress was even aware of NSR exemptions provided under EPA’s NSPS regulations when it created the NSR program. *See Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 121 (1978) (stating that, even where legislative history indicates some degree of awareness of an agency’s statutory interpretation, “We are extremely hesitant to presume general congressional awareness of the Commission’s construction based only upon a few isolated statements in the thousands of pages of legislative documents.”), *see also Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 169 (2001). Second, the broad categorical exemption that EPA now seeks for NSR purposes did not even exist in the NSPS regulations in 1977, and EPA does not claim otherwise. Indeed, such an exemption has never been available under the NSPS program. Thus, Congress could not have ratified EPA’s ability to create this exemption.

Perhaps recognizing the unavailability of a traditional ratification argument, EPA advances the novel and extraordinary argument that what Congress ratified was not a specific approach, but a general grant of discretion to carve out exemptions from the statutory term “any physical change.” *See* 68 Fed. Reg. at 61273/3. This argument is also entirely without merit. First, EPA’s argument rests on the implausible assumption that, without saying a single word, Congress converted a clear statutory provision (i.e., “any physical change”) into a vague standard subject to broad agency discretion. *See Sloan*, 436 U.S. at 121 (“Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of re-enactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the language of [the statutory provision].”) Not surprisingly, EPA fails to identify even a single judicial precedent extending the ratification doctrine to such lengths.

Second, EPA offers no evidence that Congress intended to endorse such a dramatic metamorphosis of the unambiguous term “any physical change,” and nothing in the legislative history suggests such an intent. Finally, EPA offers no evidence that, prior to its recent rulemaking, it had ever asserted that ambiguity in the statutory term “any physical change” grants the agency broad discretion to exempt activities from NSR. *See* 68 Fed. Reg. 61272. Thus, EPA’s argument that Congress ratified its view of the statute as granting it broad discretion to exempt activities from the term “any physical change” is simply untenable.

EPA also advances a number of statutory purposes that it believes are implemented by the categorical exemption set forth in its rule. First, in an effort to support a broad exemption of existing sources from NSR, EPA claims that Congress intended that “existing sources generally would not be required to obtain permits.” 68 Fed. Reg. 61270/1. This purported intent does not

appear in the statute or anywhere in the legislative history. To the contrary, the statute prescribes a broad trigger for NSR applicability—any physical or operational change that increases emissions. *See* 42 U.S.C. § 7411(a)(4) (requiring NSR for “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted . . .”).

Second, EPA attempts to dismiss the air quality benefits of implementing the NSR modification provision as written. EPA concedes that a more inclusive definition of the sources subject to NSR would cause many sources to limit their emissions to avoid an NSR-triggering emissions increase.⁴ *See* 68 Fed. Reg. at 61270/2. However, EPA untenably argues that NSR was not designed to encourage sources to avoid such increases, but instead was intended solely to address the installation of control equipment. *See, id.* (“[I]t is [not] the policy of the CAA to seek to promote emissions reductions by forcing new limits on hours of operation or rates of production of existing plants.”), *id.* at 61270/3 (“[T]he purpose of the NSR provisions is simply to require the installation of controls at the appropriate and opportune time.”). Again, there is no support in the statute or legislative history for these assertions. To the contrary, EPA’s claim is refuted by the language Congress actually used to define “modification”; the definition focuses expressly on whether a change “increases the amount of any air pollutant emitted,” not on whether a particular change represents an “opportune” time to install controls.

C. EPA Offers No Legally Cognizable Reason for Departing From the Plain Language of the Statute.

To avoid the literal interpretation of a statute, an agency “must show either that, as a

⁴ EPA’s pre-existing regulations offered sources the option of accepting a legally enforceable limit on their post-change emissions to avoid NSR when undertaking a physical or operational change, while still allowing *de minimis* increases. This option has been retained in the new regulations as a way for sources to avoid NSR when undertaking physical or operational changes that are not covered by the categorical exemption.

matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.” *Engine Manufacturers Assoc. v. U.S. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). The agency’s demonstration must be “extraordinarily convincing.” *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). EPA has offered nothing remotely approaching such a demonstration.

First, EPA has offered no evidence whatsoever that “as a matter of historical fact, Congress did not mean what it appears to have said” in CAA § 111(a)(4). Second, EPA has not shown that “as a matter of logic and statutory structure, [Congress] almost surely could not have meant” for the term “any physical change” to be given its plain meaning. Indeed, such an argument would be untenable in light of EPA’s vigorous arguments over the past two and a half decades for a broad interpretation of what constitutes “any physical or operational change.”

Moreover, interpreting “any physical change” in accordance with its plain meaning would not lead to anomalous or absurd results. The determination that a physical change has occurred within the meaning of CAA § 111(a)(4) does not, by itself, trigger NSR. Instead, NSR applies only to those physical changes that increase emissions. Furthermore, under EPA’s pre-existing NSR regulations, not just any emissions increase triggers NSR, but only significant increases surpassing specific *de minimis* thresholds. 40 C.F.R. §§ 51.165(a)(1)(x) and 52.21(b)(23)(i) (establishing significance thresholds for five pollutants; e.g., the significance threshold for nitrogen oxides emissions is set at 40 tons per year). Since changes that result in no or *de minimis* emissions increases are already exempt from NSR under EPA’s pre-existing regulations, the sole effect of EPA’s new regulation is to exempt physical changes that do produce significant emissions increases. It is utterly implausible to argue that Congress “almost surely could not have meant” to avoid such increases.

II. THERE IS A SUBSTANTIAL LIKELIHOOD THAT PETITIONERS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

For the reasons stated above, there is a high probability that the Court will vacate the rule. Before the Court can do so, however, the parties must submit briefs and conduct oral argument. If the related case, *State of New York, et al. v. EPA*, is any guide, then it will be many months – perhaps a year – before this case will be submitted to the Court for decision. *See* Case No. 02-1387 (and consolidated cases) (first petition filed Dec. 31, 2002; briefing schedule not yet entered). There is a substantial likelihood that the rule will cause irreparable harm during that period if it takes effect, as planned, on December 26, 2003.

A. Absent a Stay, Many Individual Sources Will, in the Months Following December 26, Increase Emissions by Dramatic Amounts as a Direct Result of the New Rule.

In the absence of a stay, the new rule will, starting on December 26, 2003, govern activities at the more than 5,000 major stationary sources of air pollution to which federal NSR rules apply directly.⁵ Those sources will undertake hundreds, if not thousands, of equipment

⁵ 68 Fed. Reg. at 61,276/2 (“[T]hese rules will apply on December 26, 2003, in any area without an approved PSD program, for which we are the reviewing authority, or for which we have delegated our authority to issue permits to a State or local reviewing authority.”). Those areas include two counties in Arizona; the most industrialized parts of California; the entirety of American Samoa, Guam, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Pennsylvania, Puerto Rico, and South Dakota; and, for certain types of facilities, the entirety of the District of Columbia and Washington State. EPA, “PSD Program Status: June 2003,” published at www.epa.gov/ttn/nsr/gen/psd_status_june03.pdf; Sagady Decl. (Ex. F, hereto), ¶ 8. There are more than 20,000 major stationary sources of air pollution in the United States, EPA, “NSR 90-Day Review Background Paper,” June 22, 2001, at 7, published at www.epa.gov/air/nsr-review/bkgrnd/nsr-review.pdf, and more than 5,000 in the areas listed above. *See* EPA, “Title V Permit Issuance Statistics – September 30, 2003, published at www.epa.gov/oar/oaqps/permits/maps/permtbl.html (listing, state by state, the number of sources subject to the Clean Air Act’s operating permit requirements, which, like the Act’s NSR requirements, apply to major stationary sources of air pollution).

replacement projects in the year following December 26.⁶ Unless the Court orders a stay, many of those equipment replacement projects will cause dramatic emissions increases as a direct result of the rule taking effect.

According to the agency, its “new equipment replacement approach will allow owners or operators to replace components under a wider variety of circumstances than they have been able to do under our prior RMRR approach.” 68 Fed. Reg. at 61,251/1. Since the circumstances that do not trigger NSR already include every activity that does not result in a significant net emission increase,⁷ the only way the new rule can make the “variety” of circumstances “wider” is to exempt more activities that result in significant net emissions increases.

That is exactly what the new rule will do. The fact that it will allow emissions increases that the existing rules would not allow is evidenced by the difference it would have caused in EPA’s NSR enforcement actions against power plants. The agency does not contest the fact that thirteen of the equipment replacement projects at issue in its enforcement proceedings against

⁶ According to a survey conducted by a utility industry group, a coal-fired power plant unit undertakes annually, on average, at least one physical activity that does not qualify as “routine” maintenance, repair, or replacement under the existing rules. EPA, “New Source Review Report to the President,” June 13, 2002, at 15, published at www.epa.gov/air/nsr-review/bkgrnd/nsr_report_to_president.pdf (citing comments submitted by the Utility Air Regulatory Group). According to the National Association of Manufacturers, “existing sources must undertake thousands of routine repair and replacement projects every year,” and “many” of these projects trigger NSR under the existing rules. National Association of Manufacturers, “Comments on Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement: Proposed Rule,” May 2, 2003 (Ex. G, hereto), at 5.

⁷ Under the existing rules, a change does not trigger NSR as long as it does not result in a “significant net emissions increase.” 40 C.F.R. § 51.165(a)(1)(v)(A)(2). EPA acknowledges in the preamble to the new rule that the existing rules allow a facility to “continue to operate indefinitely without triggering NSR – making as many physical or operational changes as it desires – as long as the changes do not result in emissions increases.” 68 Fed. Reg. at 61,273/2.

TVA – projects that resulted in thousands of additional tons of air pollution annually⁸ – would not have triggered NSR under the new rule even though they did under the existing rules. EPA, “Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review: Routine Maintenance, Repair and Replacement Regulations,” Aug. 2003 (Ex. H, hereto) (excerpt), Response to Comment 3.5.2. *See also* Schoengold Decl. (Ex. C, hereto), ¶ 21; Attachment K to Schoengold Decl. Similarly, ten of the equipment replacement projects at issue in EPA’s enforcement litigation against the Ohio Edison Company – projects that also resulted in thousands of additional tons of air pollution annually⁹ – would not have triggered NSR under the new rule even though they did under the existing rules. Schoengold Decl., ¶ 4; Attachment B to Schoengold Decl.

The *TVA* and *Ohio Edison* cases each involved one project that might have triggered NSR even under the new rule. Schoengold Decl., ¶¶ 4, 21, Attachments B, K to Schoengold Decl. In that respect, the two cases are exceptional. While the rule was still in development, EPA enforcement staff determined that if there had been an equipment replacement exemption with a cost threshold of more than one or two percent of process unit replacement cost at the time that the especially egregious conduct described in the agency enforcement cases had taken place, then ninety-five to ninety-eight percent of the activities at issue in those cases would have been exempt from NSR. General Accounting Office, “New Source Review Revisions Could Affect Utility Enforcement Cases and Public Access to Emissions Data,” Oct. 2003, at 17-18, published at www.gao.gov/new.items/d0458.pdf (citing interviews with EPA enforcement staff and

⁸ Final Order on Reconsideration in *In re Tennessee Valley Authority*, (EPA Environmental Appeals Board, September 15, 2000) (Ex. D, hereto) (excerpts), at 117-18 (detailing pollution increases resulting from projects).

⁹ *U.S. v. Ohio Edison Co.*, 276 F.Supp. 2d 829, 882 (S.D. Ohio 2003) (identifying annual emissions increases that resulted from the equipment replacement projects at issue).

internal EPA enforcement office communications). The cost threshold in the final rule is set at twenty percent. 68 Fed. Reg. at 61,277/2 (40 C.F.R. § 51.165(h)(1)). In a recent post-trial hearing in another of EPA's NSR power plant enforcement cases, defense lawyers published a chart showing that each of the equipment replacement projects at issue in the case fell well below the twenty-percent threshold (the most expensive of the eight projects cost 1.4% of process unit replacement cost). "All Baldwin Projects Are Routine Under the New 20% Rule" (Ex. I, hereto) (chart published to the United States District Court for the Southern District of Illinois on September 29, 2003 in *U.S. v. Illinois Power Co.*, Civil Action No. 99-833 (MJR)).

The owners of the country's major air pollution sources are eager to begin taking advantage of the new rule in order to carry out projects without limiting net emissions impacts. During the period for public comment, the owners urged EPA to promulgate the new rule quickly, because, they said, they wanted to carry out as soon as possible equipment replacements that would trigger NSR under the existing rules.¹⁰ After the details of the final rule became public, source owners confirmed that the postponed projects would now occur.¹¹ Some

¹⁰ See, e.g., Domtar Industries, Inc., "Re: New Source Review (NSR): Routine Maintenance, Repair and Replacement Proposal," May 2, 2003 (Ex. J, hereto), at 1 ("In our location's case there are several boiler modification projects we could do to reduce coal use and NO_x emission, but the NSR rules are holding us back."). Taking Dotmar at its word, and considering that NSR is only triggered by changes that result in significant net emissions increases, one must conclude that Dotmar's boiler modification projects would result in significant net increases in emissions of pollutants other than NO_x.

¹¹ See Eric Pianin, "Clean Air Rules to Be Relaxed; EPA Will Ease Power Plants' Requirements," *Washington Post*, Aug. 23, 2003 (Ex. K, hereto) (quoting an official of the Edison Electric Institute as saying, "I can assure you there are a lot of companies that held back on what we consider routine maintenance out of fear of triggering New Source Review actions."); see also Catherine Cash & Gerald Karey, "EPA Issues Final Rule 'Clarifying' NSR Restrictions," *Inside Energy with Federal Lands*, Sept. 1, 2003 (Ex. L, hereto) (quoting an official of the Edison Electric Institute as saying that it was likely that plant owners will "move forward with routine maintenance activities for reliability and safety of generating units" and that "[p]ower companies will be able to pursue these activities without the uncertainty and delay that has characterized the NSR program in recent years").

expressed impatience over having to wait for the rule's effective date. *See, e.g.,* Tom Doggett, "U.S. Set to Ease Pollution Rule for Power Plants," *Reuters*, Aug. 22, 2003 (Ex. M, hereto) (reporting that energy industry representatives wanted the new rule issued as soon as possible so that it could help firms conducting maintenance in the fall of 2003).

The attached declaration of Alexander J. Sagady (Ex. F, hereto), an expert in major air pollution sources, demonstrates that emissions-increasing projects will follow close on the heels of the rule's effective date. According to this expert, a large number of equipment replacement projects will take place in 2004 at major sources to which federal NSR rules apply directly. Sagady Decl., ¶¶ 18-26. He identifies seven specific, upcoming projects as good candidates for equipment replacements that will increase net emissions significantly, would trigger NSR under the existing rules, and will not trigger NSR under the new rule. *Id.*, ¶¶ 10-17. Moreover, additional information from market sources has led the expert to conclude that the number of 2004 projects that will be allowed to increase emissions more under the new rule than they would under the existing rules is much larger than seven. *Id.*, ¶¶ 18-26. Other requirements in the law will not prevent these 2004 projects from causing dramatic emissions increases if the new rule is allowed to take effect. Schoengold Decl., ¶¶ 11-15; Attachments F-H to Schoengold Decl.

B. The Emissions Increases Will Cause Irreparable Harm to Petitioners' Members.

The increased annual air pollution that, absent a stay, these 2004 projects will cause on account of the rule will heighten the risk of asthma attacks, heart attacks, lost workdays, birth defects, hospital costs, and premature death among the many thousands of individuals forced to

inhale that pollution.¹² Over a quarter million of Petitioners' members live in the areas where the new rule will govern as soon as it takes effect. Many thousands of Petitioners' members live downwind of the more than 5,000 major sources to which the rule will apply immediately.¹³ Moreover, many members live in close proximity to the seven projects that have been specifically identified by Petitioners' expert as likely to increase emissions significantly as a result of the new rule.¹⁴ Vacating the rule at the conclusion of this litigation will not undo the harm that the rule will inflict on Petitioners' members in the absence of a stay.¹⁵

III. OTHERS WILL NOT SUFFER HARM IF THE RULE IS STAYED.

As the agency responsible for the proper execution of the country's environmental laws, EPA cannot be substantially harmed by a stay that would prevent it from giving effect to a rule that contradicts the letter and the spirit of the Clean Air Act. Just as "[c]ourts of equity cannot,

¹² See, e.g., 68 Fed. Reg. 32,802, 32,908/2-3 (origins and negative health impacts of ground-level ozone pollution); EPA, "Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper – First Draft," Aug. 2003, published at www.epa.gov/ttn/naaqs/standards/pm/data/pm_staff_paper_august2003_1stdraft.pdf (origins and negative health impacts of particulate matter pollution); Zachary Corrigan, U.S. Public Interest Research Group, "Fishing for Trouble: How Toxic Mercury Contaminates Our Waterways and Threatens Recreational Fishing," June 2003, published at uspirg.org/reports/fishingfortrouble/Fishingfortrouble.pdf (using EPA and Food and Drug Administration data to identify origins and negative health impacts of mercury pollution).

¹³ See attachments to Exhibit N (hereto): Declaration of Linda Lopez (Att. 5), at ¶ 7; Declaration of Suzanne Seppi (Att. 10), at ¶ 5, 7; Declaration of Kevin Kosik (Att. 13), at ¶¶ 4, 5, 6; Declaration of Joseph Otis Minott (Att. 17), at ¶ 4; Declaration of Carlos Porras (Att. 19), at ¶¶ 5, 6, 7; Declaration of Lucy Lowenthal (Att. 21), at ¶¶ 5,6,7; Declaration of James P. Clift (Att. 24), at ¶¶ 4,5,7; Declaration of Warren P. Reiss (Att. 26), at ¶¶ 4,6; Declaration of Gene Karpinski (Att. 29), at ¶¶ 5, 6.

¹⁴ See Declarations of Petitioners' Members (Ex. N, hereto).

¹⁵ Vacatur will not undo the damage done to Petitioners' members by pollution inhaled while the rule remains in effect. Moreover, the increased emissions caused by the new rule threaten to persist long after vacatur. Industry likely will argue that NSR can never be required for construction projects that commenced while the rule remained in effect and that fell within its exemption. If industry were to prevail on that argument, then the pollution consequence of no stay would be the increased annual emissions for many years to come.

in their discretion, reject the balance that Congress has struck in a statute,” *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 497 (2001), a federal agency cannot substitute its priorities for those of Congress. Moreover, a stay would merely require the Agency to do what it has been doing for the past quarter-century, *i.e.*, utilize a well-known set of factors to determine which projects qualify as routine maintenance, repair, or replacement.

Likewise, industry is not cognizably harmed by having to comply with the new source permitting process enacted by Congress. Moreover, the current rules do not prohibit industrial polluters from making physical or operational changes. Under the current rules, a modifying facility can either agree to an enforceable cap on its post-change emissions, *see* 68 Fed. Reg. at 61273/2, or obtain a permit and, if necessary, implement pollution control measures. *See Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (finding that petitioner power company will not be harmed by participation in additional administrative and judicial proceedings).

IV. A STAY IS IN THE PUBLIC INTEREST.

Because the new rule violates the Clean Air Act, the public interest favors staying it. *See, e.g., Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1066-67 n.6 (D.C. Cir. 1998) (“Our polity would be very different indeed if the courts could decline to enforce clear laws merely because they thought them contrary to the public interest.”). Moreover, protecting public health and the environment is a central goal of the Act’s NSR provisions. Nonattainment NSR is designed to foster attainment of health-based air quality standards whose achievement is the “heart” of, and “central” to, the Act. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 66 (1975); *Union Electric Co. v. EPA*, 427 U.S. 246, 258 (1976). In attainment areas, NSR is “the *principal* mechanism for monitoring the consumption of allowable increments and for

preventing significant deterioration,” *Alabama Power Co. v. Costle*, 636 F.2d 323, 362 (D.C. Cir. 1979) (emphasis added), thus facilitating achievement of NSR’s goals, which – as repeatedly emphasized by Congress in the Act itself – encompass air quality. 42 U.S.C. § 7470.

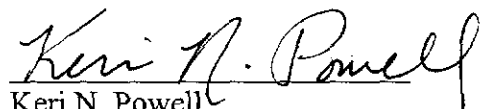
The rule will disserve these important public interests by allowing outdated power plants and other dirty industrial facilities to significantly increase their emissions of harmful pollutants. An administrative stay would protect public health and the environment by preventing the rule from being used to authorize such increases.

Moreover, a stay would further the public’s interest in administrative and judicial efficiency. Absent a stay, the rule will soon take effect across large parts of the country. While the state and local governments responsible for those areas are trying to adapt to the new rule, other governments will face pressure to begin the complicated process of revising their state implementation plans. 68 Fed. Reg. 61276/2-3 (purporting to require areas with approved NSR programs to implement the “minimum program elements” of the rule “no later than October 27, 2006”). In the likely event that a court ultimately determines that the rule violates the Clean Air Act, those efforts will have been made for naught.

CONCLUSION

For the reasons stated above, Environmental Petitioners respectfully request that this Court grant a stay of EPA’s equipment replacement rule.

DATED: November 17, 2003



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Environmental Petitioners' Motion for a Stay Pending Review has been served by United States first-class mail (or, where an email address is set forth, electronically pursuant to written consent obtained under Fed. R. App. P.25(c)(1)(D)) this 17th day of November 2003, upon the following:

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Index of Exhibits

- Exhibit A- 68 Fed. Reg. 61248 (October 27, 2003) Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair, and Replacement Exclusion; Final Rule
- Exhibit B- Letter of Jeffrey R. Holmstead, EPA, to Matthew I. Levine and David G. McIntosh, Denying Request for Administrative Stay (November 13, 2003)
- Exhibit C- Declaration of David Schoengold
- Exhibit D- Excerpts from Final Order on Reconsideration in *In re: Tennessee Valley Authority* (EPA Environmental Appeals Board, September 15, 2000)
- Exhibit E- Excerpt From Brief of Environmental Protection Agency in *Tennessee Valley Authority v. Whitman*, 336 F. 3d 1236 (11th Cir. 2003)
- Exhibit F- Declaration of Alexander J. Sagady
- Exhibit G- Comments by the National Association of Manufacturers On Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair, and Replacement: Proposed Rule, Submitted May 2, 2003
- Exhibit H- Excerpt from Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review: Routine Maintenance, Repair and Replacement Regulations, August 2003
- Exhibit I- "All Baldwin Projects are Routine Under the New 20% Rule." Chart Published to The United States District Court for the Southern District of Illinois on September 29, 2003 in *U.S. v. Illinois Power Co.*, Civil Action No. 99-833 (MJR)
- Exhibit J- Domtar Industries, Inc., "Re: New Source Review (NSR): Routine Maintenance, Repair, and Replacement Proposal" May 2, 2003
- Exhibit K- Eric Pianin, "Clean Air Rules To Be Relaxed; EPA Will Ease Power Plants' Requirements," *Washington Post*, August 23, 2003
- Exhibit L- Catherine Cash and Gerald Karey, "EPA Issues Final Rule 'Clarifying' NSR Restrictions," *Inside Energy with Federal Lands*, September 1, 2003
- Exhibit M- Tom Doggett, "U.S. Set to Ease Pollution Rule for Power Plants," *Reuters*, August 25, 2003
- Exhibit N- Membership Declarations, Attachments 1-30